UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

IIG WIRELESS, INC. f/k/a UNLIMITED PCS, INC.; and UPCS CA RESOURCES, INC.

and **Case 21-CA-152170**

JOANNA ROSALES, an individual

RESPONDENTS' RESPONSE TO THE NATIONAL LABOR RELATIONS BOARD'S NOTICE TO SHOW CAUSE

Counsel for **IIG WIRELESS MANAGEMENT, INC. f/k/a UPCS CA RESOURCES, INC.** and **IIG WIRELESS, INC. f/k/a UNLIMITED PCS, INC.** collectively ("Respondents") respectfully submit this Response to the Notice to Show Cause issued by the National Labor Relations Board ("Board") in the above-captioned matter on October 24, 2018. Respondents oppose the remand of this case to an Administrative Law Judge ("ALJ") for further proceedings in light of the Board's recent decision in *The Boeing Co.*, 365 NLRB No. 154 (2017).

As will be explained in greater detail below, Respondents believe no material questions of fact or law exist which would make such review necessary. The Mutual Arbitration Agreement ("Agreement") challenged in the Complaint is a lawful Category 1 rule as defined by the Board in *Boeing*. Accordingly, the Board should instead dismiss the case in its entirety with prejudice, finding that the Respondents did not violate the National Labor Relations Act ("Act").

I. STATEMENT OF THE CASE

There is no dispute that Charging Party Joanna Rosales signed and agreed to be bound by the Agreement on or about August 8, 2012. Joint Stipulated Facts ¶ 11. The Agreement provides, in relevant part, that the parties mutually agree to use the arbitration forum for employment-related

disputes. *See, e.g.,* Joint Exhibit 6. The Agreement contains no provision which forbids a party from filing a charge with the Board. Indeed, the Agreement is clearly to be applied solely to civil litigation, as is apparent from its very first sentence: "Binding arbitration of disputes, rather than litigation in courts, provides an effective means for resolving issues arising in or from employment situations." *Id.* (emphasis added). Arbitration is described only as an "alternative to the court system," without any mention of administrative remedies. *Id.*

Yet, the Counsel for the General Counsel ("CGC"), by and through its Complaint, alleges the Respondents violated the Act simply through the maintenance of the facially-neutral Agreement. Specifically, because employees "would reasonably conclude that the provisions of the Agreement ... would preclude employees from engaging in conduct protected by Section 7 of the Act [and] ...would interfere with employees' access to the Board and its processes." Complaint ¶ 8(c)-(d).

The ALJ agreed, citing the progeny of *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). ALJ Decision 4:1-13; 5:34-36. The ALJ found the language of the Agreement to be "not significant or substantially different from provisions found unlawful in other *D.R. Horton/Murphy Oil* cases." *Id.* at 4:3-4. Yet, these other cases were all premised on the *Lutheran Heritage* "reasonably construe" standard, which has since been overruled by the Board in *Boeing*.

II. STATEMENT OF LAW

In its *Boeing* decision, the Board issued a strong rebuke of the expansive standard which flourished under *Lutheran Heritage*. *See, e.g.,* 365 NLRB No. 154, slip op. at 2. It took particular issue with its application to the "mere maintenance of facially neutral employment policies, work rules and handbook provisions." *Id.* It found *Lutheran Heritage* had resulted in "extensive confusion and litigation" because a wide range of otherwise facially-neutral rules could be

"reasonably construed" to potentially limit Section 7 activity under some hypothetical scenario. *Id.* at 10, 12.

To correct these unintended consequences, the Board issued a new standard for determining whether a facially neutral work rule, policy or handbook violates Section 8(a)(1) of the Act. If a rule would "potentially interfere" with Section 7 rights, the Board will consider (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the requirement(s). *Id.* at 15. It is then placed into one of three categories:

- Category 1: Rules which are always lawful to maintain because: (i) when reasonably interpreted, the rule does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.
- Category 2: Rules that warrant individualized scrutiny as to whether they would prohibit or interfere with NLRA rights and, if so, whether the adverse impact is outweighed by legitimate justifications.
- Category 3: Rules which are unlawful to maintain, where the adverse impact is not outweighed by legitimate justifications.

Id. at 16. The Board's General Counsel has since issued GC Memorandum 18-04 (Guidance on Handbook Rules Post-*Boeing*) to aid the Regions in defining the various categories. As the General Counsel noted, the *Boeing* decision "significantly altered [the Board's] jurisprudence on the reasonable interpretation" of rules. GC Memo at 1.

III. ARGUMENT

A. The Agreement At Issue Is A Lawful Category 1 Rule.

The *Boeing* balancing test makes clear the Agreement is, in fact, a Category 1 rule. In fact, by the terms of the Agreement, there is no impact on NLRA rights. As the Respondents have maintained throughout the adjudication of the Complaint, the Agreement does not contain any language which prevents an employee from filing a claim with the NLRB. Indeed, the Agreement refers only to civil litigation—and does so on multiple occasions. By contrast, the Agreement

advances substantial employee and employer interests by creating a fast and cost-effective means to adjudicate issues arising out of the employment relationship which otherwise would be heard in a court of law. On balance, the substantial interest advanced by the Agreement outweighs any *de minimus* effect (of which there is none) on NLRA rights.

A "reasonable interpretation" of the Agreement requires a finding that it has no impact on NLRA rights. There is no dispute: the Agreement is silent regarding employees availing themselves to administrative processes. By contrast, it repeatedly refers to "litigation" and the "court system." The only reasonable interpretation is that the Agreement applies to employment claims that would otherwise be pursued through civil litigation.

Yet, to the extent that any ambiguity exists, it would not prevent the Agreement from being a Category 1 rule. The General Counsel has made clear that any generalized provisions not be interpreted as "banning all activity that could conceivably be included." GC Memo 18-04 at 1. Unlike *Lutheran Heritage*, the *Boeing* standard does not operate in the hypothetical, where an 8(a)(1) violation exists when a rule *could* be interpreted as prohibiting Section 7 activity. 365 NLRB No. 154, slip op. at 9, n. 43; GC Memo 18-04 at 1. Employers need not "carve out every possible overlap with NLRA coverage." 365 NLRB No. 154, slip op. at 2. The Agreement therefore cannot be found to fall outside of Category 1 simply because it does not expressly refer to the Board or the Act.

B. The Complaint Therefore Must Be Dismissed.

Where, as here, the allegation involves a Category 1 rule, it should be dismissed. GC Memo at 2. No special circumstances exist which would otherwise require further inquiry by the Board. Nor is there evidence the Agreement was used by Respondents to chill or prohibit protected

concerted activity, such that it would no longer be a lawful rule under Category 1. Therefore, no issue remains to be decided by an ALJ, if the Complaint were to be remanded.

IV. CONCLUSION

For the foregoing reasons, the Board should instead dismiss the Amended Complaint in its entirety with prejudice, finding as a matter of law Respondents did not violate Section 8(a)(1) of the Act.

DATED: November 8, 2018

Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

IIG WIRELESS, INC. f/k/a UNLIMITED PCS, INC.; and UPCS CA RESOURCES, INC.

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JOANNA ROSALES, an individual

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2018, I e-filed the foregoing **RESPONDENTS' RESPONSE TO THE NATIONAL LABOR RELATIONS BOARD'S NOTICE TO SHOW CAUSE** using the Board's e-filing system, and immediately thereafter served it by electronic mail upon the following:

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Dated this 8th day of November, 2018, at Irvine, California.

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